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Overruling Roe v. Wade: Lessons from the Death Penalty

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Overruling *Roe v. Wade*: Lessons from the Death Penalty

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Abstract

In Furman v. Georgia *(1972), the Supreme Court struck down the Georgia and Texas death penalty statutes, thereby calling into question the validity of every other state death penalty statute. In their concurring opinions, Justices Brennan and Marshall expressed the view that, given society's gradual abandonment of the death penalty, capital punishment violated the Eighth Amendment's prohibition of "cruel and unusual punishments." Justice Powell and three other justices dissented, arguing that the Court had misread the state of the law regarding society's acceptance of the death penalty. Four years after* Furman*, in a quintet of cases, the Court held that the death penalty could be imposed under properly drafted statutes, upholding three of the challenged statutes and striking down the other two. Seven of the nine justices, in separate concurring and dissenting opinions in* Gregg v. Georgia *(1976) and* Roberts v. Louisiana *(1976), agreed that, in* Furman*, Justices Brennan and Marshall had misjudged America's view of the death penalty. They noted that, since* Furman*, at least thirty-five States, as well as Congress, had enacted new statutes authorizing the death penalty. Those developments*

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undercut the assumptions upon which the abolitionists' argument rested and demonstrated that a large proportion of American society continued to regard the infliction of the death penalty as "an appropriate and necessary sanction."

This article argues that, just as Justices Brennan and Marshall misread the "signs of the times" regarding the death penalty in Furman*, so, too, did the Supreme Court in* Roe v. Wade *(1973), when it effectively struck down the abortion statutes of all fifty States.* Roe *placed great weight on the facts that seventeen States had liberalized their abortion laws and that leading professional organizations favored the repeal or substantial revision of state abortion laws.* Roe*, however, ignored that fact that the other thirty-three States had* not *liberalized their statutes and that, in thirty-one of those States, bills to relax or eliminate restrictions on abortion were introduced, but never enacted. Of even greater significance is that, in the almost fifty years since* Roe *was decided, the overwhelming majority of state legislatures have rejected* Roe *and its refusal to recognize that unborn human life is worth of protection. States have passed resolutions calling for constitutional amendments to overturn* Roe*, retained pre-*Roe *laws prohibiting abortion, enacted post-*Roe *laws that would prohibit abortion upon the overruling of* Roe*, enacted a myriad of statutes that prohibit abortions before viability and extended the protection of the law to unborn children in a variety of areas outside the context of abortion, including criminal law, tort law and health care law. The article submits that, just as the Court had to revisit the issue of the constitutionality of the death penalty in light of society's reaction to* Furman*, so, too, the Court should revisit the issue of abortion in light of the country's massive repudiation of* Roe*.*

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I. INTRODUCTION

In *Furman v. Georgia*, decided on June 29, 1972, the Supreme Court struck down the Georgia and Texas death penalty statutes, thereby calling into question the validity of every other state death penalty in the United States.[1] Less than seven months later, on January 22, 1973, the Court decided *Roe v. Wade*, effectively striking down the abortion statutes of all fifty states.[2] A comparison of the reasoning in the two cases is illuminating. In each case, the Court (or individual Justices in the majority) clearly believed that the decision reflected the direction in which society and the law was moving. In *Furman*, this belief was based on what two Justices in the majority (Justice Brennan and Justice Marshall) understood to be the gradual abandonment of the death penalty by the states; in *Roe*, it was based on the trend, as the Court viewed it, toward the relaxation or elimination of any restrictions on the reasons for which abortion could be performed. In both cases, the Justices' beliefs played a critical role in their decisions to strike down the death penalty and abortion prohibitions.

Four years after *Furman*, seven of the nine Justices, in a quintet of challenges to five newly-enacted death penalty statutes,[3] acknowledged that the Court in *Furman* had seriously misread where the country was going on the issue of the death penalty.[4] Almost fifty years after *Roe*, however, the Court has yet to acknowledge that it misread where the country was going on the equally controversial issue of abortion. If the Court's retrenchment on the death penalty provides any guidance, it is long past time for the Court to reexamine and overrule *Roe v. Wade* for, as this article argues, the states' repudiation of *Roe* is as overwhelming and dramatic as their repudiation of *Furman*.

1. 408 U.S. 238 (1972).
2. 410 U.S. 113 (1973).
3. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
4. *Gregg*, 428 U.S. at 176–87 (joint opinion of Stewart, Powell and Stevens, JJ.); *Roberts*, 428 U.S. at 350–56 (White, J., dissenting, joined by Burger, C.J., Blackmun, J., and Rehnquist, J.). Those opinions are discussed below in the text. *See infra* Section II.D.

II. *FURMAN V. GEORGIA*

In three consolidated cases decided on June 29, 1972, the Supreme Court struck down the Georgia and Texas death penalty statutes.[5] In a one-paragraph per curiam opinion, the Court held, without any elaboration or analysis, that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[6] Each of the five Justices joining the per curiam opinion—Justice Douglas, Justice Brennan, Justice Stewart, Justice White, and Justice Marshall—filed a separate opinion in support of the judgments.[7] None of these Justices formally concurred in any of the opinions written by the other four Justices. Two of the Justices who joined the per curiam opinion—Justice Brennan and Justice Marshall—based their support of the Court's judgments in part on what they regarded as American society's gradual abandonment of the death penalty as an appropriate punishment, even in the most heinous cases.

A. Justice Brennan's Concurrence in Furman

Based on his examination of "the history and present operation of the American practice of punishing criminals by death," Justice Brennan concluded that the death penalty "has been almost totally rejected by contemporary society."[8] Justice Brennan cited a number of factors in support of this conclusion: First, the methods of inflicting the death penalty had (supposedly) become more humane, replacing hanging and the firing squad with electrocution and lethal gas.[9] Second, society no longer "countenance[s] the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others," but now regards them as "debasing and

5. Furman v. Georgia, 408 U.S. 238 (1972). The other two cases were *Jackson v. Georgia*, No. 69–5030, and *Branch v. Texas*, No. 69–5031. *See Furman*, 408 U.S. at 239.

6. *Furman*, 408 U.S. at 239–40. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments," and, by virtue of the "incorporation doctrine," is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. VIII; *id.* amend. XIV, § 1. *See* Robinson v. California, 370 U.S. 660 (1962).

7. *Furman*, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

8. *Furman*, 408 U.S. at 295 (Brennan, J., concurring).

9. *Id*. at 296–97.

brutalizing to us all."[10] Third, there had been a drastic reduction in the crimes for which states actually inflicted the death penalty, which included the phenomenon of jury nullification, i.e., juries refusing to convict defendants of crimes for which capital punishment was mandatory.[11]

Finally, Justice Brennan found it "significant" that, at the time *Furman* was decided, "nine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes,"[12] and six other states, "while retaining the punishment on the books in generally applicable form, have made virtually no use of it."[13]

> [T]he history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted.[14]

Justice Brennan noted that "[j]uries . . . have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available. Governors . . . have regularly commuted a substantial number of those sentences[,]" and society's insistence upon due process of law, "to the end that no person will be unjustly put to death, thus [ensures] that many more of those sentences will not be carried

10. *Id.* at 297.

11. *Id*. at 297–98 (citation omitted).

12. *Id.* at 298 (footnotes and citations omitted).

13. *Id.* at 298 n.53 (citation omitted).

14. *Id.* at 299. As Justice Powell noted in his dissent, "little weight can be given to the lack of executions in recent years." *Id*. at 434–35 n.18 (Powell, J., dissenting). "A *de facto* moratorium has existed for five years now while cases challenging the procedures for implementing the capital sentence have been re-examined by this Court." *Id.* And the "infrequency of executions during the years before the moratorium become fully effective may be attributable in part to decisions of this Court giving expanded scope to the criminal procedural protections of the Bill of Rights, especially under the Fourth and Fifth Amendments," and in part to "decisions of the early 1960's amplifying the scope of the federal habeas corpus remedy." *Id*. (citations omitted).

out."[15] "In sum, we have made death a rare punishment today."[16] "The progressive decline in, and the current rarity of, the infliction of death," according to Justice Brennan, "demonstrate that our society seriously questions the appropriateness of this punishment today."[17] The "virtually total" rejection of the death penalty "by contemporary society" was one of the four grounds on which Justice Brennan concluded that the infliction of the death penalty violates the Eighth Amendment.[18]

B. Justice Marshall's Concurrence in Furman

In his concurring opinion in *Furman*, Justice Marshall expressed the view that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."[19] But, he added, "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."[20] In support of this conclusion, he relied in part on the trend toward limiting the circumstances under which states could inflict the death penalty, or even eliminating it as an authorized punishment.[21]

C. Justice Powell's Dissent in Furman

Justice Powell, joined by Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, dissented in *Furman*.[22] In his dissent, Justice Powell said, "Any attempt to discern contemporary standards of decency through the review of objective factors must take into account several overriding considerations which petitioners choose to discount or ignore."[23] "In a

15. *Id.* at 299 (Brennan, J., concurring). For Justice Powell's discussion of the incidence and significance of jury verdicts of death, see *id.* at 439–41 (Powell, J., dissenting); *id*. at 434–36 & nn.18–19.

16. *Id.* at 299 (Brennan, J., concurring).

17. *Id.*

18. *Id.* at 305. The other grounds identified by Justice Brennan were that the death penalty "is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily[;]" and "there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment." *Id.*

19. *Id*. at 358–59 (Marshall, J., concurring).

20. *Id*. at 360.

21. *Id.* at 333–42.

22. *Id*. at 414 (Powell, J., dissenting).

23. *Id*. at 436.

democracy," Justice Powell emphasized, "the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."[24] And what were those judgments at the time *Furman* was decided? "Forty States, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes," a number that had "remained relatively static since the end of World War I."[25] Congress authorized the death penalty in 1961 for aircraft piracy, in 1965 for presidential and vice-presidential assassinations, and in 1971 for congressional assassination.[26] "In four states the death penalty ha[d] been put to a vote of the people through public referenda—a means," Justice Powell observed, "likely to supply objective evidence of community standards."[27] A referendum to abolish capital punishment in Oregon failed in 1958, but was subsequently approved in 1964; the death penalty was approved by overwhelming margins in binding referenda in Colorado in 1966 and in Illinois in 1970, while an advisory referendum in Massachusetts in 1968 recommended retention of the penalty.[28] Significantly, of the forty states that had retained the death penalty, half of those states introduced bills to modify or repeal the death penalty, only one of which (in Delaware) became law—all of the other bills either never emerged from a committee or were defeated (usually by a lopsided vote) on the floor.[29] "This recent history of activity with respect to legislation concerning the death penalty," Justice Powell found, "abundantly refutes the abolitionist position."[30]

Summarizing his analysis of the "objective factors" regarding the death penalty, Justice Powell concluded that "the indicators most likely to reflect the public's view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving

24. *Id.*; *see also* Stanford v. Kentucky, 492 U.S. 361, 373 (1989) ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.").

25. *Furman*, 408 U.S. at 437 (Powell, J., dissenting). At the time *Furman* was decided, nine states had abolished the death penalty by statute, while the death penalty in a tenth state (California) had been struck down on state constitutional grounds by the state supreme court. *See* People v. Anderson, 493 P.2d 880 (Cal. 1972).

26. *Furman*, 408 U.S. at 437 (Powell, J., dissenting) (citations omitted).

27. *Id.* at 438.

28. *Id.* at 438–39 (citations omitted). The author recalls voting in the Illinois referendum, in which the issue of the death penalty was one of four issues submitted separately from the vote on approving or rejecting the 1970 Illinois Constitution.

29. *Id.* at 439 (citation omitted).

30. *Id*.

standards of decency require total abolition of capital punishment."[31] To the contrary, "the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition."[32]

D. The Court Revisits Furman

Four years after *Furman* (and three and one-half years after *Roe*), the Court upheld the death penalties of Georgia, Florida, and Texas, while striking down the death penalties authorized by North Carolina and Louisiana.[33] In the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, and the dissenting opinion authored by Justice White in *Roberts v. Louisiana*, in which Chief Justice Burger, Justice Blackmun, and Justice Rehnquist joined, seven of the nine Justices acknowledged that Justices Brennan and Marshall had completely misread America's view of the death penalty in their concurring opinions in *Furman*.

The joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia* said that "developments during the four years since *Furman* have undercut substantially the assumptions upon which [the abolitionists'] argument rested."[34] "[I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction."[35] In support of this conclusion, the joint opinion noted that "[t]he legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person," while Congress, in 1974, "enacted a statute providing the death penalty for aircraft piracy that results in death."[36] "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," the joint opinion said, and that response made clear that "capital punishment itself has not been rejected by

31. *Id*. at 442.
32. *Id*. at 442–43.
33. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
34. *Gregg*, 428 U.S. at 179.
35. *Id*.
36. *Id*. at 179–80 (citations omitted).

the elected representatives of the people."[37] Moreover, in the only statewide referendum occurring since *Furman*, "the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California . . . that the death penalty violated the California Constitution."[38]

In his dissenting opinion in *Roberts v. Louisiana*, Justice White, writing for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, noted that, in their concurring opinions in *Furman*, Justices Brennan and Marshall had expressed the view that "the death penalty had become unacceptable to the great majority of the people of this country and for that reason, alone or combined with other reasons, was invalid under the Eighth Amendment, which must be construed and applied to reflect the evolving moral standards of the country."[39] "That argument," Justice White wrote, "whether or not accurate at that time, when measured by the manner in which the death penalty was being administered under the then-prevailing statutory schemes,[[40]] is no longer descriptive of the country's attitude."[41] Like the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, Justice White noted in *Roberts* that since *Furman*, "Congress and 35 state legislatures re-enacted the death penalty for one or more crimes," and that the California Constitution "was amended by initiative and referendum to reinstate the penalty (with approximately two-thirds of those voting approving the measure)."[42] "With these profound developments in mind," Justice White wrote, "I cannot say that capital punishment has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States or that it is always an excessively cruel or severe punishment or always a disproportionate punishment for any crime for which it might be imposed."[43]

37. *Id*. at 179, 180–81.

38. *Id*. at 181 (citation omitted).

39. Roberts v. Louisiana, 428 U.S. 325, 351–52 (White, J., dissenting). The Supreme Court struck down the Louisiana death penalty challenged in *Roberts* and the North Carolina penalty challenged in *Woodson* on grounds independent of those advanced by Justices Brennan and Marshall in their separate concurrences in *Furman*. *See Roberts*, 428 U.S. at 331–36 (joint opinion of Stewart, Powell, and Stevens, JJ.,), *Woodson*, 248 U.S. at 282–304 (joint opinion of Stewart, Powell, and Stevens, JJ.).

40. For the reasons set forth in Justice Powell's dissent in *Furman*, discussed above, it is doubtful whether that argument accurately described the country's attitude toward the appropriateness of the death penalty in 1972. *See* Furman v. Georgia, 403 U.S. 238, 414–65 (1972) (Powell, J., dissenting).

41. *Roberts*, 428 U.S. at 352 (White, J., dissenting).

42. *Id.* at 352 & n.5.

43. *Id.* at 353.

"These grounds for invalidating the death penalty," Justice White concluded, "are foreclosed by recent events, which this Court must accept as demonstrating that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings."[44]

III. *ROE V. WADE*

Less than seven months after the Supreme Court decided *Furman v. Georgia*, the Court decided *Roe v. Wade*,[45] recognizing a right to abortion for any reason before viability, and for virtually any reason thereafter.[46] The effect of the decision was to overturn the abortion laws of all fifty states. Nineteen years after *Roe*, a bare majority of the Supreme Court reaffirmed the viability rule, holding that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[47]

In its survey of evolving attitudes toward abortion, the Court in *Roe* noted that the American Medical Association, the American Public Health Association, the American Bar Association, and the American Law Institute

44. *Id.* The author takes no position on whether, or under what circumstances, the death penalty should be inflicted or, for that matter, whether the death penalty, as administered, violates the Eighth Amendment. Rather, the point of citing the Court's death penalty decisions is to demonstrate how faulty factual premises may lead to erroneous legal conclusions and, further, that the Court's understanding of what the American people think about a given issue and the Court's confident predictions—express or implied—of the direction in which American society is moving on a given issue may be deeply mistaken.

45. 410 U.S. 113 (1973).

46. *See Roe*, 410 U.S. at 164–65. Under *Roe*, the states have no authority to prohibit abortion before viability, and any prohibition of abortion after viability must make exceptions for the pregnant woman's life or health. *Id*. (summarizing holdings). Given the very expansive definition of health in *Doe v. Bolton*, the companion case to *Roe*, it is doubtful that any meaningful restrictions may be placed on the reasons for which a post viability abortion may be performed. *Doe*, 410 U.S. 179, 192 (1973) ("[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health."). And indeed, no attempt to limit post-viability abortions has ever been upheld. *See* Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 CASE W. RES. L. REV. 283, 333–36 & nn.266–92 (2019) (discussing cases challenging statutes restricting post-viability abortions).

47. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992). *Casey* also reaffirmed *Roe*'s holding that "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* (quoting *Roe*, 410 U.S. at 164–65).

(ALI) (in the Model Penal Code) had all recommended that legal restrictions on abortion be substantially relaxed and that abortion be allowed either on demand (at least until late in pregnancy) or under a very broad range of circumstances.[48] Section 230.3(2) of the Model Penal Code, for example, authorized an abortion if there was "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother[49] or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse."[50] The Court noted that "[f]ourteen States have adopted some form of the ALI statute,"[51] and that by the end of 1970, four other states "had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements."[52]

48. *Roe*, 410 U.S. at 139–47.

49. Experience has demonstrated that providing an exception for the mental health of the mother is inherently manipulable and, therefore, no different in practice from an abortion-on-demand statute. *See* People v. Barksdale, 503 P.2d 257, 265 (Cal. 1972). According to data cited by the California Supreme Court in a challenge to the California Therapeutic Abortion Act of 1967, more than 60,000 abortions were authorized and performed in 1970 for alleged "mental health" reasons, even though the standard for invoking the exception was the same as the standard for civil commitment, i.e., the pregnant woman had to pose a danger to herself or to others or to the property of others. *Id.* It is absurd to believe that more than 60,000 women met the standard for civil commitment merely because they were pregnant. *Id.* California, it must be emphasized, was the *only* State that attempted to restrict the scope of a mental health exception, which suggests that similar exceptions in other state pre-*Roe* abortion statutes were likely abused as well.

50. MODEL PENAL CODE, § 230.3(2) ("*Justifiable Abortion*"). Two physicians, one of whom could be the physician performing the abortion, had to certify in writing "the circumstances which they believe to justify the abortion." *Id*. at § 230.3(3) ("*Physicians' Certificates*"). Section 230.3 provided no mechanism by which the physicians' certifications that the abortion was "justified" could be reviewed either administratively or judicially. *Id.* Moreover, the model provision did not prohibit self-abortions or abortions performed by third persons who were not licensed physicians unless the pregnancy had "continued beyond the twenty-sixth week." *Id.* at § 230.3(4) ("*Self-Abortion*"). The text of § 230.3 is set out in Appendix B to the Court's decision in *Doe v. Bolton*, 410 U.S. 179, 205 (1973), the companion case to *Roe*. In *Doe*, the Court affirmed, as modified, the district court's judgment striking down major provisions of the Georgia abortion statute, which was based on § 230.3 of the Model Penal Code. *Doe v. Bolton*, 410 U.S. at 202.

51. *Roe*, 410 U.S. at 140 n.37. The fourteen states the Court cited as having adopted some version of the Model Penal Code provision were Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. *Id.* The inclusion of Mississippi in this list is questionable because, in amending its "life of the mother" only abortion law in 1966, the legislature added an exception for rape, but none of the other exceptions set forth in the Model Penal Code provision.

52. *Roe*, 410 U.S. at 140 n.37. The Court's description of the four states that had "repealed criminal penalties for abortions performed in early pregnancy" mischaracterized the statutes enacted in Alaska, Hawaii, New York, and Washington. *Id.* The Alaska and Hawaii statutes allowed abortions

It is hard to imagine that the Court in *Roe* would have bothered to mention the foregoing developments unless it believed that both society and the law were moving in the direction of abolishing any meaningful restrictions on the reasons for which abortions could be performed and also thought that such movement, as in the case of the declining infliction of the death penalty before *Furman v. Georgia*, was somehow relevant to the constitutional calculus.[53] But, as was the case with Justice Brennan's and Justice Marshall's concurring opinions in *Furman*, the Court in *Roe* got it wrong, both with respect to reading the past and predicting the future.

Critique of Roe v. Wade

Prior to *Roe*, seventeen states adopted the Model Penal Code provision on abortion or went even further and enacted statutes allowing abortion on demand until late in pregnancy, but almost twice as many states (the other thirty-three) did *not* do so. And in thirty-one of those states, more than 150 bills to broaden the circumstances under which abortions could be performed were introduced in the state legislatures before *Roe* was decided, but were never enacted.[54] With the exception of Florida, which in 1972 enacted an abortion statute based on the Model Penal Code in response to the state supreme court's decision striking down the state's life-of-the-mother statute,[55] no state relaxed its restrictions on abortion after November 1970. Moreover,

to be performed for any reason before viability which, at the time *Roe* was decided, did not occur until somewhere between the twenty-fourth and twenty-eighth week of pregnancy, which certainly is not "early pregnancy." *Id.* at 160. The New York statute allowed abortion for any reason until the twenty-fourth week of pregnancy. The Washington statute allowed abortion for any reason up to the point of "quickening," usually understood to occur between the sixteenth and eighteenth week of pregnancy, or "four lunar months," which is sixteen weeks (a lunar month is twenty-eight days). The "health requirements" the Court mentioned concerned only who could perform the abortion (a licensed physician) and where the procedure could be performed (a hospital). None of the four statutes placed any restrictions on the reasons for which an abortion could be performed.

53. This inference is supported by the Court's statement, near the beginning of its opinion, that it had "inquired into, and [had] place[d] some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries," as well as its statement toward the end of its opinion that its holding was "consistent" with, *inter alia*, "the lessons and examples of medical and legal history." *Roe v. Wade*, 410 U.S. at 117, 165.

54. *See infra* Appendix A. A list of the bills and a brief description of what they provided is set forth in Appendix A. To the author's knowledge, a comprehensive list of abortion bills introduced (but never enacted) in these thirty-one states has never been published. Prior to *Roe*, no bills were introduced to amend or repeal the existing abortion laws in Louisiana or South Dakota.

55. *See* State v. Barquet, 262 So. 2d 431 (Fla. 1972).

in state referenda held in November 1972, on the eve of *Roe*, the citizens of Michigan and North Dakota defeated, by overwhelming margins, efforts to relax the restrictions on abortion.[56] And barely two years after New York enacted its abortion-on-demand statute, allowing abortions for any reason up to the twenty-fourth week of pregnancy, the state legislature voted to repeal that statute and prohibit abortion except to preserve the life of the mother,[57] a repeal that failed only because of Governor Rockefeller's veto.[58] The *Roe* opinion betrayed no familiarity with any of the foregoing.

The states' reaction to *Roe v. Wade*, both at the time and in the almost fifty years since, is even more telling. Following *Roe*, state legislatures, with varying degrees of success, struggled with regulating abortion within the limitations imposed by *Roe* and its progeny.[59] And over time, most (but not all) of those legislatures repealed their pre-*Roe* statutes *prohibiting* abortion,[60] possibly as part of a political compromise that was necessary in order to enact statutes *regulating* abortion. But notwithstanding those repeals, in at least nine distinct ways, the overwhelming majority of states have expressed their profound disagreement with (and rejection of) the abortion regime imposed upon them by the Court in *Roe*.[61]

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56. *See infra* Appendix A. The measure to allow abortion on demand in Michigan was defeated by a margin of 3–2, and a similar measure in North Dakota was defeated by a margin of 3–1. *Id.*

57. *See* Assemb. B. 2774, 179th Leg., Reg. Sess. (N.Y. 1971) ("An Act[:] To amend the penal law, in relation to justifiable abortional acts and repealing subdivision three of section 125.05 of such law relating thereto.").

58. *See* Memorandum from Nelson A. Rockefeller, Fifty-third Governor of New York State, 179–80 (May 13, 1972) (Public Papers of Nelson A. Rockefeller) (memorandum filed with Assemb. B. 2774).

59. *See generally* Joseph P. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976). A comprehensive survey of state abortion statutes as of 1990 may be found in the author's article. *See* Paul Benjamin Linton, *Enforcement of State Abortion Statutes After* Roe*: A State-by-State Analysis*, 67 U. DETROIT L. REV. 157 (1990); *see also* Brief for 127 Members of the Missouri General Assembly As Amici Curiae Supporting Appellants, Appendix B, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) (listing state statutes enacted as of February 1989).

60. *See* PAUL BENJAMIN LINTON, ABORTION UNDER STATE CONSTITUTIONS (Carolina Academic Press, 3d ed. 2020) (All of the repeals are noted at the beginning of each state chapter in the author's book.).

61. These are presented in summary form in Appendix B, *infra*. Five of the states identified in Appendix B and discussed later in this article—Delaware, Illinois, Maine, Maryland, and Rhode Island—have enacted statutes codifying *Roe v. Wade* and affirmatively recognizing a state (statutory) right to abortion. *See* DEL. CODE ANN. tit. 24, § 1790 (2020); 775 ILL. COMP. STAT. ANN. § 55/1–5 *et seq*. (West 2019) ("Reproductive Health Act"); ME. REV. STAT. ANN. tit. 22, § 1598(1) (2020); MD. CODE ANN., HEALTH-GEN. II, § 20-209(b) (2009); R.I. GEN. LAWS § 23-4-13.1 (2020) ("Reproductive

(1) Nineteen states have adopted resolutions calling on Congress to convene a constitutional convention under Article V of the Constitution for the purpose of proposing an amendment to the United States Constitution that would prohibit abortion or allow the states to prohibit abortion.[62]

(2) Twenty-three states have adopted resolutions asking Congress to propose an abortion-related amendment to the Constitution.[63] Eliminating double-counting for states that have adopted both resolutions (thirteen states), and deducting the one state that has rescinded all of its convention calls but never asked Congress to propose an amendment addressing abortion (Tennessee), there are twenty-eight states that have sought a federal constitutional amendment—either proposed by a constitutional convention or by Congress—that would prohibit abortion or restore the states' authority to do so.[64]

Privacy Act"). Those states are not included in the final count of states that have rejected *Roe*. *See infra* notes 84–86 and accompanying text.

62. *See* LYNN D. WARDLE & MARY ANN WOOD, A LAWYER LOOKS AT ABORTION 211–16 (BYU Press 1982) (listing resolutions adopted by Alabama, Arkansas, Delaware, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah).

Because of concerns that a convention called under Article V could not be limited to the topic for which it had been convened, eight of these states have rescinded all of their prior convention calls. *See* Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Amendment*, 34 HARV. J. L. & PUB. POL'Y 837, 856 (2011) (noting that since 1993, Idaho, Oklahoma, South Dakota, and Tennessee, along with eight other states, "have rescinded any and all of their prior convention applications"); *id.* at 872 (confirming that Utah has repealed "any and all prior convention applications"). The text of the resolutions rescinding convention applications may be found in the Appendix to Professor Paulsen's article. *Id.* at 867–72. Prior to 1993, Louisiana rescinded "any and all previous applications for a [federal] constitutional convention, 'for any purpose, limited or general.'" Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 773 (1993) (quoting 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)). Delaware rescinded "all prior applications" to Congress "to call a convention pursuant to Article V of the United States Constitution" in 2016. H. Res. 60, 148th Gen. Assemb., Reg. Sess. (Del. 2016). Nevada followed suit in 2017. S.J. Res. 10, 2017 Leg., 79th Sess. (Nev. 2017).

63. *See* WARDLE & WOOD, *supra* note 62, at 217 (listing memorials or requests by Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin).

64. Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin.

(3) More than thirty states have recognized the medical and scientific fact that human life begins at conception;[65] have expressed a public policy to

65. *See* ALA. CODE § 26-23E-2(4) (2019) ("Abortion . . . involves the taking of human life."); IND. CODE ANN. § 16-34-2-1.1(a)(1)(E) (West 2019) (requiring a woman seeking an abortion to be informed, *inter alia*, that "human physical life begins when a human ovum is fertilized by a human sperm"); KAN. STAT. ANN. § 65-6709(b)(5) (2019) (requiring a woman seeking an abortion to be informed, *inter alia*, that the abortion "will terminate the life of a whole, separate, unique, living human being"); *id.* at § 65-6710(2)(E) (stating the same information in printed materials that must be provided to a woman seeking an abortion); *id.* at § 65-6732(a)(1) (legislative finding that "[t]he life of each human being begins at fertilization"); KY. REV. STAT. ANN. § 311.720(8) (West 2019) (defining "human being" to mean "any member of the species homo sapiens from fertilization until death"); LA. STAT. ANN. § 40:1061.8 (West 2019) (declaring and finding that "the unborn child is a human being from the time of conception"); MO. REV. STAT. § 1.205.1(1) (2017); N.D. CENT. CODE § 14-02.1-02(11)(a)(2) (2019) (requiring a woman seeking an abortion to be informed, *inter alia*, that the abortion "will terminate the life of a whole, separate, unique, living human being"); S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2019) (stating the same as North Dakota's statute); *id.* at § 34-23A-1.2 ("The Legislature finds that all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being."). This does *not* include the dozens of statutes regulating abortion that define the term "unborn child" in terms that clearly imply that human life begins at conception. *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-730(A)(4) (West 2020) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus").

protect unborn human life[66] and/or to prefer childbirth over abortion,[67] or otherwise "deplore the destruction of the unborn human lives" that has resulted from the Supreme Court's decision in *Roe v. Wade*;[68] have adopted rules of construction conferring legal status upon the unborn child;[69] and/or

66. *See* ALA. CONST. amend. 930 (2018) (expressing public policy "to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life"); ALA. CODE § 26-21-1(d) (2019) (parental consent statute expressing a similar public policy); *id.* at § 26-22-1(a) (expressing same public policy in post-viability law); ARK. CONST. amend. 68, § 2 ("The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."); KY. REV. STAT. ANN. § 311.710(5) (West 2019) (expressing legislative intent "to recognize and to protect the lives of all human beings regardless of their degree of biological development"); KAN. STAT. ANN. § 65-6732(a)(2) (2019) ("[U]nborn children have interests in life, health and well-being that should be protected."); LA. STAT. ANN. § 40:1061.8 (2019) (stating that an unborn child is "a legal person" and "is entitled to the right to life from conception under the laws and Constitution of this State"); MICH. COMP. LAWS ANN. § 333.17014(f) (West 2019) (expressing the state's interest in "protecting the fetus," subject to federal constitutional limitations); MONT. CODE ANN. § 50-20-102 (2019) (reaffirming the tradition of the state of Montana "to protect every human life, whether unborn or aged, healthy or sick"); *id*. at § 50-20-103 (expressing legislative intent "to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation"); N.D. CENT. CODE § 14-02.1-01 (2019) (reaffirming the tradition of the state of North Dakota "to protect every human life whether unborn or aged, healthy or sick"); 18 PA. CONS. STAT. ANN. § 3202(a) (West 2019) (expressing the General Assembly's intent "to protect the life and health of the child subject to abortion"); UTAH CODE ANN. § 76-7-301.1(1)–(3) (LexisNexis 2019) (recognizing that unborn children have "inherent and inalienable rights that are entitled to protection by the state of Utah" under the Utah Constitution, that the state of Utah "has a compelling interest in the protection of the lives of unborn children," and that it is the legislature's intent "to protect and guarantee to unborn children their inherent and inalienable right to life" as required by the Utah Constitution).

67. *See* ALA. CODE § 26-21-1(d) (2019) (parental consent law); *id.* at § 26-22-1(a) (2019) (expressing public policy); ARIZ. REV. STAT. ANN. §§ 15-115(A), (B) (2020) (expressing the state's "strong interest in promoting childbirth and adoption over elective abortion"); IDAHO CODE § 39-9302(1)(b) (2019) (expressing public policy of the state "to promote live childbirth over abortion"); IND. CODE ANN. § 16-34-1-1 (West 2019) ("Childbirth is preferred, encouraged, and supported over abortion."); MINN. STAT. ANN. § 256B.011 (West 2019) (expressing the policy of the state of Minnesota that "[b]etween normal childbirth and abortion it is the policy of the state of Minnesota that normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens"); OHIO REV. CODE ANN. § 9.041 (LexisNexis 2019) (expressing the public policy of the state of Ohio "to prefer childbirth over abortion to the extent that is constitutionally permissible"); TENN. CODE ANN. § 71-5-157 (2019) (same with respect to the public policy of Tennessee).

68. NEB. REV. STAT. § 28-325(2) (2019); *see also* LA. STAT. ANN. § 40:1061.8 (2019) (finding and declaring that "the longstanding policy of this State . . . to protect the right to life of the unborn child from conception by prohibiting abortion" is "impermissible only because of the decisions of the United States Supreme Court"); TENN. CODE ANN. § 4-8-305 (2019) (authorizing construction on the capitol complex of a monument "in memory of the victims of abortion, babies, women, and men").

69. *See* ALA. CONST. amend. 930 (expressing public policy "to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate"); IDAHO CODE § 18-601

have enacted statutes extending the protection of the law to unborn children (outside the context of abortion).[70]

(4) Six states—Arizona, Michigan, Oklahoma, Texas, West Virginia, and Wisconsin—have not repealed their pre-*Roe* statutes which prohibit abortion except to save the life of the mother.[71]

(5) Four states—Alabama, Louisiana, Rhode Island, and Utah—have all, at one time or another, enacted post-*Roe* statutes that purported to prohibit

(2019) (declaring public policy "that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion"); KAN. STAT. ANN. § 65-6732(b) (2019) (declaring that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state," subject to state and federal constitutional provisions); MO. REV. STAT. § 1.205.2 (2019) (stating substantially the same as Kansas); MONT. CODE ANN. § 50-20-102 (2019) (reaffirming the intent of the state of Montana "to extend the protection of the laws of Montana in favor of all human life"); 18 PA. CONS. STAT. ANN. § 3202(c) (West 2019) (same).

70. In criminal law, thirty states have defined the unlawful killing of an unborn child as a form of homicide, regardless of the stage of pregnancy at which the injury causing death was inflicted. *See* Linton & Quinlan, *supra* note 46, at 321 n.205 (2019) (citing and cross-referencing citations to statutes enacted in Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin). And fifteen states have recognized a cause of action for wrongful death for intentional, willful, or negligent conduct that causes the death of an unborn child without regard to the stage of pregnancy when the injury causing death occurred. *Id.* at 324 n.219 (citing and cross-referencing citations to statutes and court decisions from Alabama, Alaska, Arkansas, Illinois, Kansas, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, South Dakota, Utah, Texas, Virginia, and West Virginia).

71. *See* ARIZ. REV. STAT. ANN. §§ 13-3603, 13-3604 (LexisNexis 2015); MICH. COMP. LAWS ANN. § 750.14 (West 2004); OKLA. STAT. ANN. tit. 21, §§ 861–62 (West 2002); TEX. REV. CIV. STAT. ANN. §§ 4512.1, 4512.2, 4512.3, 4512.4, 4512.6 (West 1976); W. VA. CODE § 61-2-8 (2014); WIS. STAT. ANN. § 940.04 (West 2005). Of course, these statutes are not currently enforceable. *See* Roe v. Wade, 410 U.S. 113 (1973) (making state statutes that prohibit abortion unconstitutional and thus unenforceable). Although the pre-*Roe* Texas statutes have not been reprinted in the current volumes of either the Texas Revised Civil Statutes or the Texas Penal Code, they have not been expressly repealed. *Id.* In *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), however, the Fifth Circuit held that the pre-*Roe* statutes *prohibiting* abortion have been repealed by implication with the enactment of post-*Roe* statutes and rules *regulating* abortion. *Id.* at 849. The court's analysis is superficial and unpersuasive (e.g., one of the three laws the court cited in support of its repeal-by-implication analysis was an administrative regulation, not a statute) and, in any event, would not be binding upon a Texas state court. *Id.* Two state courts—the Michigan Court of Appeals and the Wisconsin Supreme Court—have rejected "repeal-by-implication" arguments made against their pre-*Roe* statutes. *See* People v. Higuera, 625 N.W.2d 444, 448–49 (Mich. Ct. App. 2001); State v. Black, 526 N.W.2d 132, 134–35 (Wis. 1994); *see also* David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without* Roe*: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385 (1992) (discussing doctrine of repeal by implication).

abortion throughout pregnancy: the Rhode Island statute was enacted shortly after *Roe*,[72] the Louisiana and Utah statutes were enacted after the Supreme Court's decision in *Webster v. Reproductive Health Services*[73] but before *Planned Parenthood v. Casey*,[74] and the Alabama statute was enacted in 2019.[75] All four have been declared unconstitutional and/or enjoined,[76] and three of them have been repealed (the challenge to the Alabama statute is ongoing).[77]

(6) Ten states—Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Tennessee, and Utah—have enacted statutes that would go into effect and prohibit most abortions throughout pregnancy upon the overruling of *Roe v. Wade* (or the adoption of a federal constitutional amendment that would permit such legislation).[78]

(7) Ten states—Arkansas, Georgia, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio, and Tennessee—have enacted statutes prohibiting abortion after the unborn child has a detectable heartbeat (usually between the sixth and ninth week of pregnancy). None of these statutes is currently in force.[79]

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72. 1973 R.I. Pub. Laws 67, 68, ch. 15.

73. 492 U.S. 490 (1989).

74. 1991 La. Acts 26 (prohibiting abortion except under specified circumstances); 1991 Utah Legis. Serv. ch. 1 (West) (amended by S.B. 4, 1991 Legis., 1st Spec. Sess. (Utah 1991)).

75. Alabama Human Life Protection Act, H.B. 314, 189th Leg., Reg. Sess. (Ala. 2019).

76. *See* Doe v. Israel, 358 F. Supp. 1193 (D. R.I. 1973), *aff'd*, 482 F.2d 156 (1st Cir. 1973); Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), *aff'd sub nom*. Sojourner T. v. Edwards, 974 F.3d 27 (5th Cir. 1992); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), *aff'd in part*, *rev'd in part*, 61 F.3d 1493 (10th Cir. 1995), *rev'd and remanded sub nom*. Leavitt v. Jane L., 518 U.S. 137 (1996), *on remand*, 102 F.3d 1112 (10th Cir. 1996); Robinson v. Marshall, 415 F. Supp. 3d 1053, 1059–60 (M.D. Ala. 2019) (granting plaintiffs' motion for preliminary injunction).

77. Louisiana and Utah, as noted in the next paragraph, have enacted laws that would prohibit most abortions upon the overruling of *Roe* (or the adoption of a federal constitutional amendment that would allow such legislation).

78. *See* ARK. CODE ANN. § 5-61-301 *et seq*. (2019) (the "Arkansas Human Life Protection Act"); IDAHO CODE ANN. § 18-622 (2020); KY. REV. STAT. ANN. § 311.772 (West 2020); LA. REV. STAT. ANN. § 40:1061 (2018); MISS. CODE ANN. § 41-41-45 (2019); MO. REV. STAT. § 188.017 (2020) (the "Right to Life of the Unborn Child Act"); N.D. CENT. CODE § 12.1-31-12 (2019); S.D. CODIFIED LAWS § 22-17-5.1 (2019); TENN. CODE ANN. § 39-15-213 (2019); UTAH CODE ANN. § 76-7a-101 *et seq*. (West 2020). The author drafted the Idaho and Tennessee statutes. The Mississippi statute might be unenforceable on state constitutional grounds, however. *See* Pro-Choice Mississippi v. Fordice, 716 So.2d 645, 650–54 (Miss. 1998) (recognizing a state privacy right to abortion).

79. *See* Paul Benjamin Linton, *The Pro-Life Movement At (Almost) Fifty: Where Do We Go From Here?*, 18 AVE MARIA L. REV. 15, 21–-22 & nn. 35–-38 (2020) [hereinafter *Pro-Life Movement*] (listing states and status of litigation challenging statutes); *see also* SisterSong Women of Color

(8) Twenty-three states have enacted statutes prohibiting abortion at various stages of gestation up to twenty weeks of gestation, which is before viability.[80] Most of the statutes that prohibit abortion after twenty weeks have not been challenged.[81]

(9) Finally, sixteen states have prohibited abortions sought because of the race, gender, and/or disability of the unborn child.[82] When challenged, these statutes have been declared unconstitutional and/or enjoined.[83]

In sum, since *Roe v. Wade*, thirty-nine states have adopted resolutions

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Reprod. Justice Collective v. Kemp, 410 F. Supp. 3d 1327 (N.D. Ga. 2019) (declaring §§ 3 and 4 of Georgia's H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) unconstitutional and permanently enjoining their enforcement); Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 3957792 (M.D. Tenn. 2020) (granting a temporary restraining order (July 13, 2020) and preliminary injunction (July 24, 2020), enjoining Tennessee's H.B. 2263/S.B. 2196, 111th Gen. Assemb., Reg. Sess. § 2 (Tenn. 2020) (enacting, *inter alia*, TENN. CODE ANN. § 39-15-216(c)(1))).

80. Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. *See Pro-Life Movement*, *supra* note 79, at 22–25 & nn.39–56 (listing statutes and status of litigation); *see also* H.B. 2263, 111th Gen. Assemb., Reg. Sess. § 2 (Tenn. 2020) (enacting, *inter alia*, TENN. CODE ANN. §§ 39-15-216(c)(2)–(8) (banning abortions at six, eight, ten, twelve, fifteen, eighteen, and twenty weeks, respectively)). The same bill also prohibits abortion at twenty-one weeks, twenty-two weeks, twenty-three weeks, and twenty-four weeks. *Id*. (enacting TENN. CODE ANN. §§ 39-15-216(c)(9)–(12)).

81. This may be attributable to the fact that few or no late-term abortions are performed in many of these states. *See* Paul Benjamin Linton, *Twenty-Week Abortion Bans: Ineffective, Unconstitutional and Unwise*, 30 B.Y.U. J. PUB. L. 83 (2016) (discussing incidence of late-term abortions in states that have enacted twenty-week abortion bans). Five of these statutes have been challenged, however, and have been declared unconstitutional, enjoined, or both with respect to their previability applications. *See Pro-Life Movement*, *supra* note 79, at 24–25 & nn.57–60 (discussing litigation). The Eighth Circuit has recently affirmed the preliminary injunction enjoining enforcement of the Arkansas eighteen-week abortion ban. *See* Little Rock Family Planning Servs. v. Rutledge, No. 19-2690, 2021 WL 29484 (8th Cir. Jan. 5, 2021), *aff'g* 397 F. Supp. 3d 1213 (E.D. Ark. 2019). For Tennessee, *see* Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 3957792 (M.D. Tenn. 2020) (enjoining previability applications of Tennessee bill).

82. Arizona, Arkansas, Kansas, Kentucky, Illinois, Indiana, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Tennessee. *See Pro-Life Movement*, *supra* note 79, at 25–26 & nn.61–62, 66 (citing statutes); *see also* H.B. 1295, 2020 Leg., Reg. Sess. (Miss. 2020) (enacting the "Life Equality Act of 2020"); H.B. 2263, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020) (enacting, *inter alia*, TENN. CODE ANN. §§ 39-15-217(b), (c), (d) (banning abortions because of the sex, race, or disability of the unborn child (e.g., Down Syndrome), respectively)).

83. *Pro-Life Movement*, *supra* note 79, at 25–26 & nn.63–65, 67 (citing litigation). In the same opinion in which it affirmed the preliminary injunction against enforcement of the Arkansas eighteen-week abortion ban, the Eighth Circuit affirmed the preliminary injunction enjoining enforcement of the State's ban on Down Syndrome abortions. *See Little Rock Family Planning Servs.*, 2021 WL 29484. For Tennessee, see *Memphis Ctr. for Reprod. Health*, 2020 WL 3957792 (enjoining category-based bans).

calling for a federal constitutional amendment to overturn *Roe v. Wade*, have recognized that unborn human life deserves legal protection from the moment of conception, or have enacted statutes that directly conflict with the viability rule—that, regardless of reason, the states may not prohibit abortions before viability.[84] Of these thirty-nine states, five have subsequently enacted statutes that codify *Roe v. Wade* and affirmatively recognize a state (statutory) right to abortion.[85] Excluding those five states, the legislatures of thirty-four States, in one respect or another, have rejected *Roe* and its refusal to recognize that unborn human life is worthy of legal protection, whether in the context of abortion or otherwise.[86]

IV. CONCLUSION

In the fifty years since the Supreme Court decided *Roe v. Wade*, more than *two-thirds* of the States have challenged the rationale and the results of the Court's opinion. That fact is striking. It strongly suggests that, contrary to the Court's attempt to end the debate over abortion, neither the American people nor their elected representatives have agreed to forgo their opposition to abortion "by accepting a common mandate rooted in the Constitution."[87] In *Casey*, the Court called the "contending sides of a national controversy to end their national division" by submitting to the Court's interpretation of what the Constitution purportedly mandates.[88] That interpretation forbids the states from prohibiting any abortions before viability. It is remarkable, therefore, that almost all of the statutes the states have enacted since *Roe* that prohibit some or most abortions before viability were enacted *after* the Court reaffirmed the viability rule in *Casey*.

84. Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.

85. *See supra* note 61 (citing the statutes enacted in Delaware, Illinois, Maine, Maryland, and Rhode Island). Similar statutes have been enacted in several states that have never questioned or challenged *Roe*. *See* CAL. HEALTH & SAFETY CODE § 123460 *et seq*. (West 2003) ("Reproductive Privacy Act"); CONN. GEN. STAT. ANN. § 19a-602(a) (West 2003); N.Y. PUB. HEALTH LAW § 2599-aa *et seq*. (McKinney 2010) ("Reproductive Health Act"); 2017 Or. Laws, ch. 721, § 8 ("Reproductive Health Equity Act"); VT. CODE ANN., tit. 18, § 9493 *et seq*. (2019) ("Freedom of Choice Act"); WASH. REV. CODE ANN. §§ 9.02.100, 9.02.110 (West 1991).

86. *See supra* note 84 (listing all of the thirty-four states except Delaware, Illinois, Maine, Maryland, and Rhode Island).

87. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

88. *Id*.

The Supreme Court cannot continue to ignore the states', and the American people's, persistent, longstanding, and overwhelming repudiation of its flawed interpretation of the Constitution while pretending that it has "settled" the issue of abortion. In *Roe*, the Court seriously and gravely misread the direction in which the country was moving on the subject of abortion, a misreading that provided critical support for its recognition of a virtually unlimited right to abortion. As in the case of the death penalty, the Court should revisit its premises, overrule *Roe*, and return the issue of abortion to where it properly belongs—to the American people and their elected representatives.

APPENDIX A•

Appendix A contains a list of bills introduced, but not enacted, before *Roe v. Wade* was decided that would have allowed abortions to be performed under broader circumstances than permitted under existing law.♦

• The author wishes to express his appreciation to Ryan S. Joslin, Esq., who, as a summer intern at Americans United for Life, compiled a list of most of the bills described in this appendix and obtained copies of many of those bills. The author also appreciates the assistance of Michael Taylor, past Executive Secretary of the National Right to Life Committee, and the Dr. Joseph R. Stanton Human Life Issues Archives, in bringing to the author's attention a number of pre-*Roe* abortion bills. Finally, the author acknowledges the invaluable assistance of state legislative reference bureau staffs, state librarians and archivists, and, especially, Steve Harrison, Clerk of the West Virginia House of Delegates, in securing copies of numerous pre-*Roe* abortion bills described herein.

♦ None of the bills described in the appendix, as introduced or amended, was enacted (except for three recodifications of state criminal laws that were enacted without any language weakening existing protections of unborn human life). The description of the bills is limited to explaining on what grounds (if any were specified) an abortion could be performed, by whom (a licensed physician and/or the pregnant woman herself), and whether there were any limitations on the stage of pregnancy at which the procedure could be performed. The description does not discuss provisions that related to the consent required (if any) by a married woman's husband or by the parents of a minor; whether there was a residency requirement; whether the approval of a hospital committee was required; or any other statutory requirements. Without using quotation marks, the descriptions generally track the actual language used in the bills.

State	Reasons for Which Abortions Were Permitted Under Existing Law at Time *Roe v. Wade* was Decided	Year of Session	Bill No.	Description of Bill
Alabama	Life or Health of the Mother	1967 Reg. Sess.	H.B. 472	would have amended existing law to allow an abortion to be performed by a licensed physician before the sixteenth week of pregnancy if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of pregnancy would likely result in the death of the woman, serious permanent impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation
		1967 Reg. Sess.	S.B. 322	same as H.B. 472
		1967 Reg. Sess.	H.B. 81	same as H.B. 472

Arizona	Life of the Mother	28th Leg., 1st Reg. Sess. (1967)	S.B.26	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; if there was substantial risk that the child would be born with grave physical or mental defect; or if the pregnancy resulted from rape or incest
		28th Leg., 2d Reg. Sess. (1968)	S.B. 75	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that continuation of the pregnancy would seriously impair the physical or mental health of the woman; if there was a substantial risk that the child would be born with serious physical or mental defect; or if the pregnancy resulted from rape or incest
		28th Leg., 2d Reg. Sess. (1968)	H.B. 96	same as S.B. 75
		29th Leg., 1st Reg. Sess. (1969)	H.B. 32	same as S.B. 75

	29th Leg., 1st Reg. Sess. (1969)	S.B. 69	same as S.B. 75		
	29th Leg., 1st Reg. Sess. (1969)	H.B. 172	would have amended existing law to allow a licensed physician to perform an abortion for any reason at any stage of pregnancy		
	29th Leg., 2d Reg. Sess. (1970)	H.B. 20	same as H.B. 172		

		29th Leg., 2d Reg. Sess. (1970)	S.B.216	would have amended existing law to allow an abortion to be performed by a licensed physician within the first nineteen weeks of gestation if continuation of the pregnancy was likely to result in the death of the woman or grave impairment to her physical or mental health, or at any stage of pregnancy if there was significant risk that continuance of the pregnancy would seriously endanger the life of the mother
		30th Leg., 1st Reg. Sess. (1971)	S.B. 123	same as S.B. 216
		30th Leg. 1st Reg. Sess. (1971)	H.B. 51	would have repealed existing laws, thereby allowing an abortion to be performed for any reason at any stage of pregnancy
Connecticut	Life of the Mother	Gen. Assemb., Jan. Sess. (1969)	H.B. 5490	would have repealed existing laws and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if continuance of the pregnancy could threaten the mental or physical health or life of the mother; if the infant might be born with incapacitating physical deformity or mental deficiency; or if

				continuance of a pregnancy, resulting from rape or incest, could constitute a threat to the mental or physical health of the mother
		Gen. Assemb., Jan. Sess. (1971)	S.B. 331	would have repealed existing laws and allowed an abortion to be performed by a licensed physician (or by the pregnant woman herself) for any reason within the first twenty-four weeks from the commencement of her pregnancy, or at any stage of the pregnancy to preserve the life of the woman
		Gen. Assemb., Jan. Sess. (1971)	H.B. 8349	same as S.B. 331
		Gen. Assemb., Jan. Sess. (1971)	H.B. 7576	would have repealed existing laws, thereby allowing abortions to be performed for any reason at any stage of pregnancy

	Gen. Assemb., May Spec. Sess. (1972)	S.B. 501	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason within the first twenty-four weeks from the commencement of the pregnancy, or at any state of pregnancy to preserve the life of the woman	
	Gen. Assemb., May Spec. Sess. (1972)	H.B. 6001	would have effectively repealed existing law and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy	
	Gen. Assemb., May Spec. Sess. (1972)	H.B. 6003	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason within the first twelve weeks from the onset of pregnancy, or at any stage of pregnancy to preserve the life of the woman	
	Gen. Assemb., May Spec. Sess. (1972)	H.B. 6004	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason within the first twenty weeks from the commencement of the woman's pregnancy, or at any stage of pregnancy to preserve the life of the woman	

Idaho	Life of the Mother	41st Leg., 1st Reg. Sess. (1971)	S.B. 1221	would have repealed existing laws and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy would endanger the life of the mother, or if the abortion were determined to be "justifiable," a term not defined in the bill
		41st Leg., 1st Reg. Sess. (1971)	H.B. 109	would have repealed existing laws and allowed an abortion to be performed by a licensed physician if the pregnancy resulted from rape or incest and the abortion was performed within twelve weeks of the rape or incest that resulted in the pregnancy, or at any stage of pregnancy if the pregnancy would endanger the life of the mother
		41st Leg., 2d Reg. Sess. (1972)	S.B. 1345	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason before the tenth week of pregnancy, or at any stage of the pregnancy if the health of the female was in grave danger

Illinois	Life of the Mother	76th Gen. Assemb., Reg. Sess. (1969)	S.B. 603	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy (bill was later amended to allow an abortion to be performed by a licensed physician before the sixteenth week of gestation if continuation of the pregnancy was likely to result in the serious permanent impairment of the physical or mental health of the woman or if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the woman or the birth of a child with grave and permanent physical deformity or mental retardation)
		76th Gen. Assemb., Reg. Sess. (1969)	H.B. 633	would have changed existing law to allow the Department of Public Health to establish general rules and regulations concerning the terminations of pregnancies by licensed physicians in licensed hospitals (bill was later amended to allow an abortion to be performed by a licensed

				physician if a continued pregnancy would likely result in the serious impairment of the pregnant female's physical or mental health and the pregnant female made arrangements for a hospital admission no later than twelve weeks after gestation)
		76th Gen. Assemb., Reg. Sess. (1969)	H.B. 634	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
		76th Gen. Assemb. (1969)	H.B. 663	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy (bill was later amended to allow an abortion to be performed by a licensed physician before the sixteenth week of gestation if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the woman or serious permanent impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation)

	76th Gen. Assemb., Reg. Sess. (1969)	H.B. 1407	would have repealed existing law and allowed an abortion to be performed by a licensed physician within the first twenty weeks of gestation for any reason, and after the first twenty weeks if the abortion was necessary to preserve the life of the pregnant female; if continuance of the pregnancy would gravely endanger and impair the physical or mental health of the female; or if there was substantial risk that the child would be grossly malformed or seriously impaired in physical or mental capacities
	77th Gen. Assemb. (1971)	H.B. 43	same as H.B. 1407 (bill was later amended to allow an abortion to be performed by a licensed physician during the first trimester of pregnancy for any reason, and after the first trimester if continuance of the pregnancy would gravely endanger and impair the physical or mental health of the female, or if there was substantial risk that the child would be grossly malformed or seriously impaired in physical or mental capacities)

	77th Gen. Assemb., Reg. Sess. (1971)	H.B. 853	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason within twelve weeks from the commencement of the woman's pregnancy, and within twenty weeks from the commencement of pregnancy if the abortion was necessary for the preservation of the woman's health or life
	77th Gen. Assemb., Reg. Sess. (1971)	H.B. 1552	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason within twelve weeks from the commencement of pregnancy
	77th Gen. Assemb., Reg. Sess. (1971)	H.B. 1865	would have changed existing law to allow an abortion to be performed by a licensed physician for any reason within the first twelve weeks of pregnancy
	77th Gen. Assemb., Reg. Sess. (1971)	H.B. 2838	same as H.B. 633 (as originally introduced)
	77th Gen. Assemb., Reg. Sess. (1971)	H.B. 3075	same as H.B. 633 (as originally introduced)

		77th Gen. Assemb., Reg. Sess. (1971)	H.B. 3076	would have amended existing law to allow an abortion to be performed by a licensed physician within twelve weeks from the commencement of pregnancy if the abortion was necessary for the mental or physical well-being of the woman, or within twenty weeks from the commencement of pregnancy if the abortion was necessary for the preservation of the woman's life
		77th Gen. Assemb., Reg. Sess. (1971)	S.B. 748	same as H.B. 1552
Indiana	Life of the Mother	1967 Gen. Assemb., Jan. Reg. Sess. (1967)	H.B. 1621	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if termination of the pregnancy was necessary to avoid serious danger to the life or health of the pregnant woman (the determination of which could take into account social conditions and other circumstances that could affect her health; if there was substantial risk that the child could be born with grave physical or mental defect; if the pregnant woman was mentally defective; or if the pregnancy

				resulted from rape or incest (bill was later substantially amended to allow an abortion to be performed by a licensed physician only if termination of the pregnancy was necessary to avoid serious danger to the life of the pregnant woman or if the pregnancy resulted from an act of rape or incest; the bill, so amended, passed the legislature but was vetoed by the Governor)
Iowa	Life of the Mother	62d Gen. Assemb., Reg. Sess. (1967)	Senate File 645	would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; if the child would be born with grave physical or mental defect; or if the pregnancy resulted from rape, incest, or other felonious intercourse (bill was later substantially amended, passed by both chambers of the legislature, and vetoed by the Governor)

	63d Gen. Assemb., Reg. Sess. (1969–1970)	S.F. 202		would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if continuance of the pregnancy could threaten the life or the mental or physical health of the woman; or could result in the birth of an infant with incapacitating physical deformity or mental deficiency; or if the pregnancy resulted from rape or incest
	63d Gen. Assemb., Reg. Sess. (1969–1970)	H.F. 261		same as S.F. 202
	63d Gen. Assemb., Reg. Sess. (1969–1970)	S.F. 502		would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy when necessary to preserve the health of the woman
	63d Gen. Assemb., Reg. Sess. (1969–1970)	S.F. 584		would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy

	63d Gen. Assemb., Reg. Sess. (1969–1970)	S.F. 1052	same as S.F. 584	
	63d Gen. Assemb. (1969–1970)	H.F. 626	would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy to preserve the woman's health	
	64th Gen. Assemb. (1971–1972)	S.F. 114	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason before the twentieth week of gestation	
	64th Gen. Assemb., Reg. Sess. (1971–1972)	H.F 134	same as S.F. 114 (bill was later amended to allow an abortion to be performed by a licensed physician for any reason within twelve weeks from the commencement of the pregnancy or at any stage of pregnancy to save the life of the pregnant female person)	

		64th Gen. Assemb., Reg. Sess. (1971–1972)	S.F. 344	would have repealed existing law and allowed an abortion to be performed by a licensed physician if continuance of the pregnancy could threaten the life or the mental health of the woman or result in the birth of an infant with incapacitating physical deformity or mental deficiency; or if the pregnancy resulted from rape or incest
Kentucky	Life of the Mother	Gen. Assemb., Reg. Sess. (1968)	H.B. 120	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman; if there was substantial risk that the child would be born with grave physical or mental defect; or if the pregnancy resulted from rape or incest
		Gen. Assemb., Reg. Sess. (1972)	H.B. 197	Section 276 of a comprehensive revision and codification of the Commonwealth's criminal laws would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if termination of the pregnancy was necessary to preserve the life of the female; if continuance of the pregnancy would constitute a substantial

					risk that the physical or mental health of the mother would be seriously impaired; if there was a substantial risk that the fetus would be born with a serious physical or mental defect; or if the pregnancy resulted from rape, incest or other felonious intercourse (the amendment to the pre-*Roe* abortion law was deleted in the bill that was enacted, Ky. Acts ch. 385 (1972)).
	Maine	Life of the Mother	103d Leg., Reg. Sess. (1967)	Senate Paper 215 (Legis. Doc. 478)	would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect; or that the pregnancy resulted from rape, incest or other felonious intercourse
			103d Leg., Reg. Sess. (1967)	S.P. 667 (Legis. Doc. 1695)	would have repealed existing law and allowed an abortion to be performed by a licensed physician before the sixteenth week of gestation if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of the pregnancy would probably result in the death of the woman, or the serious permanent

				impairment of the physical health of the woman, or the birth of a child with grave and permanent mental or physical infirmity
		104th Leg., Reg. Sess. (1969)	H.P. 602 (Legis. Doc. 783)	would have repealed existing law and allowed an abortion to be performed by a licensed physician before the twenty-sixth week of gestation if there was a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother, or the birth of a child with grave and permanent physical deformity or mental retardation; or if the pregnancy resulted from rape or incest; or at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the mother
		105th Leg., Reg. Sess. (1971)	H.P. 100 (Legis. Doc. 144)	would have repealed existing law, thereby allowing abortions to be performed for any reason at any stage of pregnancy

	105th Leg., Reg. Sess. (1971)	H.P. 1157 (Legis. Doc. 1373)	would have repealed existing law and allowed an abortion to be performed by a licensed physician during the first trimester if there was a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother; if there was substantial risk of the birth of the child with grave and permanent deformity or mental retardation; or if the pregnancy resulted from rape or incest; or at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the mother
	105th Leg., Reg. Sess. (1971)	H.P. 1024 (Legis. Doc. 1406)	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason during the first twenty weeks of gestation, or at any stage of pregnancy to save the mother's life
	105th Leg., Reg. Sess. (1971)	H.P. 1324 (Legis. Doc. 1736)	would have repealed existing law and allowed an abortion to be performed by a licensed physician during the first twenty weeks of gestation if the procedure was determined to be in the best interests of the patient's welfare, or at any stage of pregnancy to save the life of the mother

Massachu-setts	law prohibited "unlawful" abortions (interpreted by the Massachusetts Supreme Judicial Court to include the physical or mental health of the mother)	165th Gen. Court, 2d Sess. (1968)	H. 1914	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would seriously impair the physical or mental health of the mother or that the child would be born with serious physical or mental defect, or if the pregnancy resulted from rape, incest, or other felonious intercourse (including all illicit intercourse with a girl below the age of sixteen); or if continuance of the pregnancy would adversely affect in a serious manner the future well-being of the pregnant woman and/or her other children
		165th Gen. Court, 2d Sess. (1968)	H. 3728	would have amended existing law to allow an abortion to be performed by a licensed physician before the sixteenth week of gestation if the pregnancy resulted from rape or incest, or at any stage of pregnancy if the pregnancy was likely to result in the death of the woman, or serious permanent impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation

	166th Gen. Court, 1st Sess. (1969)	H. 3362	same as H. 3728	
	166th Gen. Court, 2d Sess. (1970)	H. 1684	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if the pregnancy would result in the death of the mother, impair her mental health, if the pregnancy resulted from rape or incest, or if the pregnancy could result in the birth of a child with mental or physical handicap; also would have allowed an abortion to be performed by a licensed physician on any married woman who wanted no more children and any unmarried woman who was unwilling to bear an illegitimate child	
	166th Gen. Court, 2d Sess. (1970)	H. 1113	would have repealed existing laws, thereby allowing an abortion to be performed for any reason at any stage of pregnancy	
	167th Gen. Court, 1st Sess. (1971)	H. 3680	same in substance as H. 1113	

	167th Gen. Court, 1st Sess. (1971)	H. 4504	same in substance as H. 1113		
	167th Gen. Court, 1st Sess. (1971)	S. 996	same as H. 1113		
	167th Gen. Court, 2d Sess. (1972)	H. 635	same as H. 1113		
	167th Gen. Court, 2d Sess. (1972)	H. 3431	would have amended existing law to permit an abortion to be performed by a licensed physician at any stage of pregnancy if it was necessary to preserve the woman from an imminent physical or mental peril that would substantially endanger her life		
	167th Gen. Court, 2d Sess. (1972)	H. 4182	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy		

		167th Gen. Court, 2d Sess. (1972)	H. 4764	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy would cause grave and certain danger to the life of the pregnant woman and/or would seriously and certainly endanger her physical or mental health
		167th Gen. Court, 2d Sess. (1972)	S. 842	same as H. 1113
Michigan	Life of the Mother	74th Leg., 1st Sess. (1967)	S.B. 568	would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if termination of the pregnancy was necessary for the preservation of the physical or mental health of the mother or if there was a substantial risk that the child would be born with a grave physical or mental defect, or if the pregnancy resulted from rape or incest

	75th Leg., 1st Sess. (1969)	S.B. 287	would have amended existing law to allow an abortion to be performed by a licensed physician before the nineteenth week of pregnancy if there was significant risk that continuance of the pregnancy would seriously impair the physical or mental health of the mother, if the pregnancy resulted from rape or incest, or if there was significant risk that the child would be born with serious physical or mental defect; or at any stage of pregnancy if there was significant risk that continuance of the pregnancy would seriously endanger the life of the mother
	75th Leg., 1st Sess. (1969)	S.B. 288	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
	75th Leg., 1st Sess.(1969)	S.B. 374	substantially the same as S.B. 288

	75th Leg., 1st Sess. (1969)	H.B. 3364	same as S.B. 287	
	75th Leg., 2d Sess. (1970)	S.B. 1260	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason during the first three months of pregnancy, and at any time of pregnancy if there was significant risk that continuance of the pregnancy would seriously endanger the mental or physical health of the woman	
	76th Leg., 1st Sess.(1971)	S.B. 3	would have amended existing law to allow an abortion to be performed for any reason if the period of gestation had not exceeded four lunar months (sixteen weeks), or at any stage of pregnancy if continuance of the pregnancy would constitute a significant danger to the life of the mother (bill was later amended to allow an abortion to be performed by a licensed physician for any reason if the period of gestation had not exceeded ninety days, or at any stage of pregnancy if continuance of the pregnancy would constitute a significant risk of serious danger to the mental or physical health of the woman;	

					or if there was a significant risk that the fetus would be born with serious mental or physical impairment, defect or deficiency)
		76th Leg., 1st Sess. (1971)	S.B. 149		would have repealed existing law, thereby allowing an abortion to be performed for any reason at any stage of pregnancy
		76th Leg., 1st Sess. (1971)	S.B. 220		would have amended existing law to eliminate basing a manslaughter charge on the performance of an illegal abortion
		76th Leg., 1st Sess. (1971)	S.B. 483		same as S.B. 3, as amended
		76th Leg., 2d Sess. (1972)	H.B. 4004		an amendment offered to a recodification of the State' s criminal law would have allowed an abortion to be performed by a licensed physician for any reason within the first ninety days of gestation, and at any stage of pregnancy if continuance of the pregnancy would constitute a significant risk of serious danger to the mental or physical health of the woman or there was a significant risk that the fetus

					would be born with serious mental or physical impairment, defect or deficiency (amendment was defeated and recodification passed)
		76th Leg., 2d Sess. (1972)	H.B. 6110		would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
		Indirect Initiated State Statute (Nov. 7, 1972)	Proposal B		would have amended existing law to allow an abortion to be performed by a licensed physician for any reason during the first twenty weeks of gestation; measure was rejected by three-fifths of the electorate (39.35% for and 60.65% against) (*See Michigan Abortion Legalization Initiative, Proposal B*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Abortion_Legalization_Initiative,_Proposal_B_(1972) (last visited Nov. 24, 2020))
Minnesota	Life of the Mother	Leg., Reg. Sess. (1967)	Senate File 930		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that continuation of the pregnancy would

					gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or if the pregnancy resulted from rape or from incest (bill was later amended to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the woman, serious, permanent impairment of her physical or mental health, or the birth of the child with grave and permanent physical deformity, or mental retardation)
		Leg., Reg. Sess. (1969)	S.F. 998		would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
		Leg., Reg. Sess. (1969)	S.F. 1025		substantially the same as S.F. 998
		Leg., Reg. Sess. (1971)	H.F. 588		substantially the same as S.F. 998
		Leg., Reg. Sess. (1971)	S.F. 430		same as H.F. 588

		Leg., Reg. Sess. (1971)	S.F. 757	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy based on undefined "medical indications"
Mississippi	Life of the Mother, Rape	Leg., Reg. Sess. (1971)	H.B. 468	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a probability that the infant would be born deformed or mentally defective; if it was necessary to preserve the mother's physical or mental health or if there was a serious threat to the mother's physical or mental health if the pregnancy continued; or if the pregnancy resulted from incest
		Leg., Reg. Sess. (1971)	H.B. 204	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason within twenty-four weeks from the commencement of the woman's pregnancy, or at any stage of pregnancy to preserve her life
		Leg., Reg. Sess. (1972)	H.B. 1036	would have amended existing law to allow an abortion to be performed by a licensed physician if the pregnancy resulted from forcible or statutory rape or incest (existing

					law permitted abortion only in case of forcible rape or to save the life of the mother)
		Leg., Reg. Sess. (1972)	S.B. 2157		same as H.B. 1036
Missouri	Life of the Mother	74th Gen. Assemb., Reg. Sess. (1967)	S.B. 356		would have repealed existing law and allowed an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect; or if the pregnancy resulted from rape, incest, or other felonious intercourse (bill was later amended to eliminate the exceptions for mental health, rape, incest, or other felonious intercourse)
		75th Gen. Assemb., Reg. Sess. (1969)	S.B. 206		would have repealed existing law to allow an abortion to be performed by a licensed physician if continuance of the pregnancy would impair the health of the mother or if the child would be born with a grave permanent physical defect; or if the pregnancy resulted from rape or incest

		76th Gen. Assemb., 1st Reg. Sess. (1971)	H.B. 650	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason before viability
Montana	Life of the Mother	42d Legis. Assemb., Reg. Sess. (1971)	H.B. 554	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
Nebraska	Life of the Mother	77th Leg., 1st Reg. Sess. (1967)	Legis. B. 45	would have repealed existing law and allowed an abortion to be performed by a licensed physician during the first twenty-six weeks of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape or incest
Nevada	Life of the Mother	Leg., 55th Sess. (1969)	Assemb. B. 155	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical health of the mother, or that the child would be born with grave physical or

					mental defects; or if the pregnancy resulted from forcible rape or incest
		Leg., 55th Sess. (1969)	Assemb. B. 229		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy could threaten the life of the woman or seriously impair her health; if the pregnancy resulted from rape or incest; or continuation of the pregnancy could result in the birth of a child with grave physical deformities or with mental retardation
		Leg., 55th Sess. (1969)	Assemb. B. 259		would have amended existing law and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy
		1971 Leg., 56th Sess. (1971)	Assemb. B. 4		would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason at any stage of pregnancy (bill was later amended to allow an abortion after viability only to preserve the woman's life)

		Leg., 56th Sess. (1971)	S.B. 494	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason before viability and, after viability, to preserve the woman's life
New Hampshire	Life of the Mother	Leg., Reg. Sess. (1969)	H.B. 77	would have amended existing law to allow an abortion to be performed by a licensed physician before sixteen weeks of pregnancy if the pregnancy resulted from rape or incest, or any stage of pregnancy if continuation of the pregnancy was more than likely to result in the death of the woman, serious permanent impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation
		Leg., Reg. Sess. (1971)	H.B. 239	would have repealed existing laws and allowed an abortion to be performed by a licensed physician during the first twenty-four weeks of pregnancy if the pregnancy resulted from rape or incest, if the child was likely to be born with serious physical or mental defects, or continuation of the pregnancy was likely to result in the

					serious impairment of the physical or mental health of the woman; or at any stage of pregnancy to preserve the life of the pregnant woman
		Leg., Reg. Sess. (1971)	H.B. 240		would have amended existing laws to allow an abortion to be performed by a licensed physician (or by the pregnant woman herself) for any reason within the first twenty-four weeks of pregnancy, or at any stage of pregnancy to preserve her life
		Leg., Reg. Sess. (1971)	H.B. 252		would have repealed existing laws and allowed an abortion to be performed by a licensed physician if the pregnancy resulted from rape or incest; if the child was likely to be born with serious physical or mental defects; or if continuation of the pregnancy was likely to result in the serious impairment of the physical or mental health of the woman
New Jersey	Life of the Mother (as interpreted by the New Jersey Supreme Court)	Gen. Assemb., Reg. Sess. (1969)	Assemb. 1111		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that the child, if born, would have a grave physical or mental defect by reason of the exposure of the woman to German measles (rubella) during her pregnancy

	Gen. Assemb., Reg. Sess. (1970)	Assemb. 762	would have repealed existing law and allowed an abortion to be performed by a licensed physician during the first ninety days of pregnancy if there was substantial risk that continuance of the pregnancy would greatly impair the physical or mental health of the female; if the child would be born with serious physical or mental defect, such that he would be permanently incapable of caring for himself; if the pregnancy resulted from illegal intercourse; or if the woman was unmarried and the pregnancy commenced while she was under the age of 16 years and was still unmarried at the time the abortion was to be performed; or at any stage of pregnancy if necessary to preserve the life of the female
	Gen. Assemb., Reg. Sess. (1972)	Assemb. 757	would have allowed an abortion to be performed by a licensed physician (or the pregnant woman herself) for any reason within twenty-four weeks from the commencement of pregnancy, or at any stage of pregnancy to preserve the woman's life

North Dakota	Life of the Mother	Leg., 41st Sess. (1969)	H.B. 319	would have amended existing law to allow an abortion to be performed by a licensed physician before the sixteenth week of gestation if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the woman, the serious permanent impairment of the physical health of the woman, or the serious permanent impairment of the mental health of the woman, or the birth of a child with grave and permanent physical deformity or mental retardation (bill was later amended to delete mental health exception)
		Leg., 42nd Sess. (1971)	H.B. 1500	would have amended existing law to allow an abortion to be performed by a licensed physician before the sixteenth week of gestation if the pregnancy resulted from rape or incest, or at any stage of pregnancy if continuation of the pregnancy was likely to be a detriment to a woman's right to life and would result in the death of the woman, including death from suicide, or the serious permanent impairment of the woman's health, including her physical and "psychotic [sic]" condition; or if continuation of the pregnancy would result

					in the birth of a child with grave and permanent physical deformity or mental retardation
		Citizen Initiated State Statute (Nov. 7, 1972)	Measure 1		would have amended existing law to allow an abortion to be performed by a licensed physician for any reason through the twentieth week of gestation; measure was rejected by three-fourths of the electorate (23.41% for, 76.59% against) (*See North Dakota Abortion Initiative, Measure 1*, BALLOTPEDIA, https://ballotpedia.org/North_Dakota_Abortion_Initiative,_Measure_1_(1972) (last visited Nov. 24, 2020))
Ohio	Life of the Mother	107th Gen. Assemb., Reg. Sess. (1967)	H.B. 408		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defects, or if the pregnancy resulted from rape or from incest
		108th Gen. Assemb., Reg. Sess. (1969)	H.B. 71		same as H.B. 408

	109th Gen. Assemb., Reg. Sess. (1971)	H.B. 1116	would have repealed existing law and allowed abortion to be performed for any reason at any stage of pregnancy
	109th Gen. Assemb., Reg. Sess. (1971)	H.B. 67	would have amended existing law to allow a licensed physician to perform an abortion for any reason at any stage of pregnancy
	109th Gen. Assemb., Reg. Sess. (1971)	H.B. 72	would have repealed existing laws, thereby allowing an abortion to be performed for any reason at any stage of pregnancy
	109th Gen. Assemb., Reg. Sess. (1972)	Sub. H.B. 511	an amendment offered to a recodification of the state's criminal law would have allowed an abortion to be performed by a licensed physician for any reason during the first nineteen weeks of pregnancy and at any stage of pregnancy to save the life of the mother (amendment was tabbed and recodification passed)

Oklahoma	Life of the Mother	31st Leg., 1st Reg. Sess. (1967)	H.B. 710	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuance of the pregnancy would involve serious risk to the life or of grave injury to the health, whether physical or mental, of the pregnant woman whether before, at, or after the birth of the child; if there was a substantial risk that the child would suffer from such physical or mental abnormalities as to be seriously handicapped; or if the pregnant woman was mentally defective or judged mentally incompetent or became pregnant out of wedlock while under the age of fifteen, or became pregnant as a result of rape or incest
		33d Leg., 1st Reg. Sess. (1971)	H.B. 1408	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason within fifteen weeks from the commencement of pregnancy or at any stage of pregnancy to preserve her life

		33d Leg. 2d Reg. Sess. (1972)	S.B. 458	would have repealed existing law and allowed an abortion to be performed by a licensed physician for any reason within twenty weeks of the commencement of pregnancy or at any stage of pregnancy if there was a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother; or that the child would be born with grave physical or mental defect; or if the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of sixteen (16) years of age
Pennsyl-vania	law prohibited "unlawful abortions," (understood to mean abortions other than those necessary to save the life of the mother)	Gen. Assemb., Reg. Sess. (1971)	H.B. 536	would have repealed existing laws and allowed an abortion to be performed by a licensed physician for any reason if requested by the pregnant woman prior to completion of sixteen weeks of pregnancy

		Gen. Assemb., Reg. Sess. (1971)	S.B. 617		would have repealed existing laws and allowed an abortion to be performed by a licensed physician within the first sixteen weeks of pregnancy if the continuation of the pregnancy would result in the death of the woman or if the pregnancy resulted from rape or incest; or at any time of pregnancy to save the life of the woman
		Gen. Assemb., Reg. Sess. (1971)	S.B. 928		would have repealed existing laws, thereby allowing an abortion to be performed for any reason at any stage of pregnancy
Rhode Island	Life of the Mother	Gen. Assemb., Jan. Sess. (1966)	H. 1653		would have amended existing law to allow an abortion to be performed by a licensed physician if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest
		Gen. Assemb., Jan. Sess. (1967)	H. 1069		same as H. 1653

	Gen. Assemb., Jan. Sess. (1967)	H. 1716		would have amended existing law to allow (in addition to the existing life-of-the-mother exception) an abortion to be performed by a licensed physician at any stage of pregnancy if the pregnancy resulted from rape or incest
	Gen. Assemb., Jan. Sess. (1968)	H. 1659		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect
	Gen. Assemb., Jan. Sess. (1968)	H. 1660		same as H. 1716
	Gen. Assemb., Jan. Sess. (1968)	H. 1661		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest

		Gen. Assemb., Jan. Sess. (1969)	H. 1400	same as H. 1661	
		Gen. Assemb., Jan. Sess. (1969)	H. 1401	same as H. 1659	
		Gen. Assemb., Jan. Sess. (1969)	H. 1402	substantially the same as H. 1716	
Tennessee	Life of the Mother	85th Gen. Assemb., Reg. Sess. (1967–1968)	H.B. 931	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if the pregnancy resulted from rape or incest	
		85th Gen. Assemb., Reg. Sess. (1967–1968)	S.B. 836	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the woman, or serious permanent impairment of the health or mental health of the woman, or the birth of a child with a grave and permanent physical deformity or mental retardation	

	85th Gen. Assemb., Reg. Sess. (1967–1968)	S.B. 1338	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuance of the pregnancy could threaten the life or gravely impair the health of the woman; if the child could be born with grave physical or mental defect; or the pregnancy resulted from rape or incest
	85th Gen. Assemb., Reg. Sess. (1969–1970)	H.B. 1005	same as S.B. 836
	85th Gen. Assemb., Reg. Sess. (1969–1970)	H.B. 1615	would have repealed existing laws, thereby allowing abortions to be performed for any reason at any stage of pregnancy
	85th Gen. Assemb., Reg. Sess. (1969–1970)	H.B. 1288	same as S.B. 836 (later amended to allow an abortion to be performed by a licensed physician if continuance of the pregnancy could threaten the life or gravely impair the *physical* health of the woman; if the child could be born with grave physical or mental defect; or the pregnancy resulted from rape or incest)

Texas	Life of the Mother	Leg., 60th Reg. Sess. (1967)	S.B. 275	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if the pregnancy resulted from rape or incest; if the procedure was necessary to preserve the life of the woman; if there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman; or if there was a substantial risk that the child would be born with grave physical or mental defect
		Leg., 61st Reg. Sess. (1969)	H.B. 323	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that continuation of the pregnancy would endanger the woman's life or gravely impair her physical or mental health; if there was a substantial risk that the child would be born with a grave physical or mental defect; or if the pregnancy resulted from rape or incest
		Leg., 62d Reg. Sess. (1971)	H.B. 1092	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy

		Leg., 62d Reg. Sess. (1971)	S.B. 553	same as H.B. 1092
Utah	Life of the Mother	38th Leg., Reg. Sess. (1969)	S.B. 116	would have amended existing law to allow an abortion to be performed by a licensed physician before sixteen weeks of pregnancy if the pregnancy resulted from rape or incest, or any stage of pregnancy if continuation of the pregnancy was likely to result in the death of the female, serious permanent impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation
Vermont	Life of the Mother	Gen. Assemb., Reg. Sess. (1969)	H. 199	would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if there was a substantial risk that continuance of the pregnancy would threaten the life or impair the health of the woman or that the child would be born with physical or mental defect; or if the pregnancy resulted from rape or incest

	Gen. Assemb., Reg. Sess. (1970)	S. 161		would have allowed a pregnant woman to obtain an abortion at any stage of pregnancy upon application to a probate judge for an "abortion certificate" if the judge found that there was substantial risk that unless an abortion was performed the life of the applicant would be endangered; or that her health would be impaired; or if he found that the pregnancy resulted from rape or incest; no certificate was required if a licensed physician believed that the woman would suffer irreparable harm if the abortion were delayed until an abortion certificate could be obtained
	Gen. Assemb., Reg. Sess. (Vt. 1970)	H. 218		would have amended existing law to allow an abortion to be performed by a licensed physician for any reason within twenty weeks from the commencement of pregnancy, or at any stage of pregnancy to preserve the woman's life
	Gen. Assemb., Reg. Sess. (1972)	S. 170		would have amended existing law to allow an abortion to be performed by a licensed physician at any stage of pregnancy if continuation of the pregnancy presented a grave and substantial risk to the physical or mental health of the woman

West Virginia	Life of the Mother	Leg., Reg. Sess. (1971)	H.B. 1028	would have amended existing law to allow an abortion to be performed by a licensed physician for any reason at any stage of pregnancy if the pregnant female had been declared mentally incompetent
Wisconsin	Life of the Mother	Legis. Sess. (1967)	Assemb. 677	would have repealed existing law, thereby allowing abortions to be performed for any reason at any stage of pregnancy
		Legis. Sess. (1969)	Assemb. 33	same as Assemb. 677
		Legis. Sess. (1969)	Assemb. 196	same as Assemb. 677
		Legis. Sess. (1971)	Assemb. 14	same as Assemb. 677
		Legis. Sess. (1971)	Assemb. 600	same as Assemb. 677

Wyoming	Life of the Mother	Leg., 41st Sess. (1971)	H.B. 246	would have repealed and reenacted existing laws to allow an abortion to be performed by a licensed physician (or by a person appropriately trained and acting under the direction or supervision of such physician) for any reason at any stage pregnancy

APPENDIX B

Charts on State Legislative Responses to *Roe v. Wade* (1973):

States that Have Adopted Resolutions Calling on Congress to Convene a Constitutional Convention for the Purpose of Proposing an Amendment to the United States Constitution Prohibiting Abortion or Allowing the States to Prohibit Abortion

States that Have Adopted Resolutions Asking Congress to Propose an Amendment to the United States Constitution to Prohibit Abortion or Allow the States to Prohibit Abortion

States that Have Recognized that Human Life Begins at Conception and Deserves Legal Protection at All Stages of Biological Development

States that Have Not Repealed Their Pre-*Roe* Statutes Prohibiting Abortion Except to Save the Life of the Mother

States that Enacted Statutes After *Roe v. Wade* Prohibiting Most Abortions Throughout Pregnancy

States that Have Enacted Statutes that Would Take Effect upon the Overruling of *Roe v. Wade* and Would Prohibit Most Abortions Throughout Pregnancy

States that Enacted Statutes After *Roe v. Wade* Prohibiting Abortion After the Unborn Child Has a Detectable Heartbeat

States that Enacted Statues After *Roe v. Wade* Prohibiting Abortion at Various Stages of Gestation Before Twenty Weeks (all statutes are twenty-week bans unless otherwise noted)

States that Enacted Statues After *Roe v. Wade* Prohibiting Abortion Based on the Race, Gender and/or the Disability of the Unborn Child

States that Have Adopted Resolutions Calling on Congress to Convene a Constitutional Convention for the Purpose of Proposing an Amendment to the United States Constitution Prohibiting Abortion or Allowing the States to Prohibit Abortion	States that Have Adopted Resolutions Asking Congress to Propose an Amendment to the United States Constitution to Prohibit Abortion or Allow the States to Prohibit Abortion	States that Have Recognized that Human Life Begins at Conception and Deserves Legal Protection at All Stages of Biological Development	States that Have Not Repealed Their Pre-*Roe* Statutes Prohibiting Abortion Except to Save the Life of the Mother	States that Enacted Statutes After *Roe v. Wade* Prohibiting Most Abortions Throughout Pregnancy
Alabama	Delaware	Alabama	Arizona	Alabama
Arkansas	Florida	Alaska	Michigan	Louisiana (repealed and replaced with contingency law)
Delaware (subsequently rescinded)*	Georgia	Arizona	Oklahoma	Rhode Island (repealed)
Idaho (subseqently rescinded)*	Idaho	Arkansas	Texas	Utah (repealed and replaced with contingency law)
Indiana	Illinois	Florida	West Virginia	

Kentucky	Kentucky	Georgia	Wisconsin					
Louisiana (subsequently rescinded)*	Louisiana	Idaho						
Massachusetts	Maine	Illinois						
Mississippi	Maryland	Indiana						
Missouri	Massachusetts	Kansas						
Nebraska	Minnesota	Kentucky						
Nevada (subsequently rescinded)*	Montana	Louisiana						
New Jersey	Nebraska	Michigan						
Oklahoma (subsequently rescinded)*	Nevada	Minnesota						

Pennsylvania	New Jersey	Mississippi						
Rhode Island	North Dakota	Missouri						
South Dakota (subsequently rescinded)*	Oklahoma	Montana						
Tennessee (subsequently rescinded)*	Pennsylvania	Nebraska						
Utah (subsequently rescinded)*	Rhode Island	North Carolina						
*For an explanation of the rescissions, *see supra* n. 62	South Dakota	North Dakota						
	Utah	Ohio						
	West Virginia	Oklahoma						
	Wisconsin	Pennsylvania						

South Carolina	South Dakota	Tennessee	Texas	Utah	Virginia	West Virginia	Wisconsin

States that Have Enacted Statutes that Would Take Effect upon the Overruling of *Roe v. Wade* and Would Prohibit Most Abortions Throughout Pregnancy	States that Enacted Statutes After *Roe v. Wade* Prohibiting Abortion After the Unborn Child Has a Detectable Heartbeat	States that Enacted Statues After *Roe v. Wade* Prohibiting Abortion at Various Stages of Gestation Before Twenty Weeks (all statutes are twenty-week bans unless otherwise noted)	States that Enacted Statues After *Roe v. Wade* Prohibiting Abortion Based on the Race, Gender and/or the Disability of the Unborn Child
Arkansas	Arkansas	Alabama	Arizona
Idaho	Georgia	Arizona	Arkansas
Kentucky	Iowa	Arkansas (18 weeks, 20 weeks)	Kansas
Louisiana	Kentucky	Georgia	Kentucky
Mississippi	Louisiana	Idaho	Illinois (repealed)
Missouri	Mississippi	Indiana	Indiana

North Dakota	Missouri	Kansas	Louisiana
South Dakota	North Dakota	Kentucky	Mississippi
Tennessee	Ohio	Louisiana (15 weeks, 20 weeks)	Missouri
Utah	Tennessee	Mississippi (15 weeks, 20 weeks)	North Carolina
		Missouri (8 weeks, 14 weeks, 18 weeks, 20 weeks)	North Dakota
		Nebraska	Ohio
		North Carolina	Oklahoma
		North Dakota	Pennsylvania
		Ohio	South Dakota

Tennessee								
Oklahoma	South Carolina	South Dakota	Tennessee (6 weeks, 8 weeks, 10 weeks, 12 weeks, 15 weeks, 18 weeks, 20 weeks, 21 weeks, 22 weeks, 23 weeks, 24 weeks)		Texas	Utah (18 weeks, 20 weeks)	West Virginia	Wisconsin